United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

ORIGINAL

76-2147

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P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

VINCENT PACELLI, :

Petitioner-Appellant :

:

VS. : NO. 76-2147

UNITED STATES OF AMERICA, :

Respondent-Appellee :

PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING IN BANC.

On April 27, 1977, a special panel of this Court[1] adopted the opinion of the district court below, Bonsal, J., and affirmed the lower court's denial of a hearing on appellant's pro se §2255 motion to vacate his judgment of conviction of conspiracy to violate federal narcotics laws and the eighteen year sentence imposed thereon.

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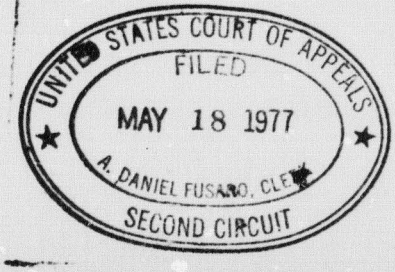
1 The panel consisted of Circuit Judge Meskill and United States District Court Judges Motley and Brieant of the Southern District of New York, sitting by designation.



Appellant, through counsel, respectfully petitions this Court, pursuant to Rule 40a, Federal Rules of Appellate Procedure, for rehearing of the appeal herein, for the reason that a recent decision of the United States Supreme Court, announced five days after decision was rendered herein, conflicts with the decision herein, and appellant further respectfully suggests, pursuant to Rule 35, Federal Rules of Appellate Procedure, a rehearing in banc, on the grounds that (1) the panel opinion herein, if permitted to stand, directly conflicts with prior decisions of this Court and the Untied States Supreme Court; and (2) in light of the United States Supreme Court's recent decision on point, the instant appeal presents an opportunity for this Court to establish guidelines for disposition of §2255 motions short of a full evidentiary hearing.

Appellant's motion and briefs have heretofore been submitted pro se and perhaps failed to focus the courts' attention properly on the crucial issue involved. Indeed, Judge Bonsal's opinion fails to mention or explain his reasoning in denying an evidentiary hearing on an issue of fact which the Government concedes is disputed, involves matters outside the record and files of this case, was properly documented in appellant's motion, and if substantiated would warrant §2255 relief. It is respectfully submitted that the law is overwhelmingly clear that summary disposition of appellant's §2255 motion was, on this point, impermissible.

A. REHEARING OF THIS APPEAL IS WARRANTED IN LIGHT OF THE RECENT UNITED STATES SUPREME COURT DECISION IN BLACKLEDGE V. ALLISON, ANNOUNCED FIVE DAYS AFTER THE PANEL'S DECISION WAS RENDERED HEREIN.

In his pro se §2255 motion, appellant alleged that Charles Hedges, the principal witness against him at trial, lied in testifying that he (Hedges) had asked for and received no help or benefits from the Government in exchange for his testimony.[2] In support of this allegation, appellant cited the sworn testimony of Hedges' cousin, James Godwin, in a subsequent federal trial, United States v. Guante, 64 Cr. 828 (S.D.N.Y.), wherein Godwin testified that Hedges had told him that Government agents had agreed to get Hedges' sentence reduced from fifteen to five years, to give Hedges money, secure his release on bond, and provide him with an apartment.[3] Appellant also alleged, with appropriate transcript citations, that each of these benefits had, in fact, been received by Hedges. [A. pps. 6-8 (Motion to Vacate Sentence, pps. 4-6)]

In response, the Government admitted that Godwin's testimony in Guante was inconsistent with Hedges' denial of assistance, but claimed that Godwin's testimony "was surely suspect and uncorroborated." [Brief for the United States, pps. 9-10]

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2. Hedges testified at appellant's trial: "I was offered nothing, promised nothing, and I asked nothing [T. 1070]." He denied knowing that the Government had not opposed his sentence reduction [T. 1072] or speaking with the Government agent in charge of his case about a reduction [T. 1070]. See Appellant's Supplemental Appendix, pps. 11-13.

Title 28 U.S.C. §2255 plainly commands that the district court shall "grant a prompt hearing" unless "the motion and the files and records of the case conclusively show that petitioner is entitled to no relief." Appellant's specified allegations of Hedges' perjury and the Government's response -- admitting the inconsistency of Hedges' and Godwin's testimony but claiming that Godwin should not be believed -- clearly sharpened a factual dispute, involving matters outside the record of appellant's trial. Summary disposition of the petition was thus forbidden by the statute. Fontaine v. United States. 411 U.S. 213 (1973); Machibroda v. United States, 368 U.S. 487 (1962).[4]

The Government's assertion that Godwin's testimony in Guante is suspect and uncorroborated cannot warrant dismissal of the petition without a hearing. In construing the statutory command of §2255, the Supreme Court has repeatedly held that "[t]he Government's contention that [a petitioner's] allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence." Machibroda v. United States, 368 U.S. 487, 495 (1962); Walker v. Johnston, 312 U.S. 275, 287 (1941).

Indeed, the Supreme Court has not hesitated to remand for evidentary hearings §2255 matters involving allegations far more improbable and unbelievable than the claim set forth below by appellant. See Machibroda v. United States, supra; DeMarco

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3. Godwin testified in Guante that Hedges had received $3,000 [T. 918] and had told him that "the agents did come and tell him that they would get him out, they would give him money, they would give him anything that he wanted if he would testify in the case [T. 919-20]. Godwin also testified that Hedges told him the agents had "told him they would, they would get his sentence reduced from 15 years to five years [T. 918]." See Appellant's Supplemental Appendix, pps. 36-38 .

v. United States, 415 U.S. 449 (1974); Fontaine v. United States, supra; Sanders v. United States, 373 U.S. 1 (1963); Walker v Johnston, supra. See also Taylor v. United States, 487 F. 2d 307 (2d Cir. 1973).

On May 2, 1977, five days after the panel's decision was rendered herein, the Court reaffirmed that summary disposition of §2255 motion is impermissible unless it is conclusively shown from the motion, files and record of the case that the allegations are "palpably incredible" or "patently frivolous or false." Blackledge v. Allison, U.S. [45 U.S.L.W. 4435, 4439 (May 3, 1977)]. In Allison, the Supreme Court set forth the procedures to be followed by a district court before a §2255 motion may be dismissed without an evidentiary hearing. Id., at 4440-1. None of these procedures, which include a motion for summary judgment, expansion of the record, and discovery, were employed by the district court below. As the Supreme Court noted at 4440 n. 25:

> [B]efore dismissing facially adequate allegations short of an evidentiary hearing, ordinarily a district judge should seek as a minimum to obtain affidavits from all persons likely to have firsthand knowledge of the existence of any plea agreement. See Walters v. Harris, 400 F. 2d 988, 922 (CA4). "'When the issue is one of credibility, resolution on the basis of affidavits can rarely be conclusive, but that is not to say that they may not be helpful.'" Advisory Committee Note to Rule 7, Rules Governing Habeas Corpus Proceedings, quoting Raines v United States, 423 F 2d 526, 530 (CA4). See also Advisory Committee Note to Rule 4, Rules Governing Habeas Corpus Proceedings ("Issues raised by [a motion to dismiss the petition, accompanied by appropriate exhibits,] will almost invariably relate to procedural matters. Substantive objections to the petitioner's claims will normally raise factual issues that must be resolved at an evidentiary hearing."

4. There is no dispute that appellant's allegations state a cognizable claim for relief. See Giglio v. United States, 405 U.S. 150 (1972).

B. IN BANC CONSIDERATION OF THE PANEL'S OPINION IS WARRANTED TO ESTABLISH FUTURE GUIDELINES FOR DISPOSITION OF §2255 MOTIONS, IN LIGHT OF BLACKLEDGE V. ALLISON.

Should the panel decline to review its decision herein, in banc consideration is appropriate. The panel's decision is in clear conflict with Taylor v. United States, 487 F.2d 307 (2d Cir. 1973), and can only serve to promote uncertainty and confusion as to the proper procedure for disposition of §2255 motions.

Moreover, clarification of the procedures for disposition of such motions is especially appropriate now that Allison has indicated that district courts may employ procedures, short of a full evidentiary hearing, for resolution of facially sufficient §2255 motions. The instant matter thus presents an opportunity for this Circuit to establish guidelines, for habeas and §2255 petitions, for disposition summarily, short of a full hearing, and/or after a full hearing.

The holding in Allison is directly applicable to the issue raised in this appeal and mandates a remand of this matter to the district court for further proceedings consistent therewith.

In light of the Supreme Court's recent decision in Blackledge V. Allison, supra, and the prior pro se memoranda submitted herein, appellant respectfully contendsthat the Court should exercise its discretion to grant a rehearing of this matter.

For the foregoing reasons, this Court should grant a rehearing or rehearing in banc of this appeal.

THE APPELLANT VINCENT PACELLI

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C E R T I F I C A T I O N

A copy of the foregoing has been mailed, postage prepaid, to all counsel of record, this 18th day of May, 1977.

David S Golub

DAVID S. GOLUB